CHANG WAN CHUAN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI YUSOFF J
[CRIMINAL APPEAL NO: 42-04-2001]
27 JUNE 2003

CRIMINAL LAW: *Penal Code - Section 376 - Rape - Identification evidence of complainant - Complainant's credit as witness - Evidence of accomplice - Corroboration - Burden and standard of proof*

CRIMINAL LAW: *Penal Code - Section 377C - Carnal intercourse against the order of nature without consent - Identification evidence of complainant - Complainant's credit as witness - Evidence of accomplice - Corroboration - Burden and standard of proof*

EVIDENCE: *Accomplice - Whether witness an accomplice - Whether an accomplice in respect of a part of the criminal transaction out of which charges against accused arose - Whether trial judge's incorrect ruling that witness was not an accomplice was fatal - Whether accused may be convicted on uncorroborated evidence of accomplice - Rape - Carnal intercourse against the order of nature without consent*

The accused was tried and convicted under both s. 376 and s. 377C of the Penal Code. For the offence of 'rape' he was sentenced to ten years' imprisonment and three strokes of the cane, whilst for the offence of 'carnal intercourse against the order of nature without consent' he was sentenced to ten years' imprisonment and two strokes of the cane. This was the accused's appeal against his conviction and sentence, and the grounds upon which the appeal was mounted were, basically, that the trial judge had erred in fact and in law in: (i) disregarding the material discrepancies in the complainant's testimony; (ii) ruling that the complainant's credit remained unimpeached despite the material contradictions in her testimony; (iii) his evaluation of the complainant's doubtful and uncertain testimony respecting her identification of the accused; (iv) accepting the uncorroborated evidence of PW2 (who had pleaded guilty to a charge of wrongfully confining the complainant), and in ruling that PW2 was not an accomplice with regard to the two specific charges brought against the accused; and (v) ruling that the accused had not raised a reasonable doubt in the prosecution's case.

Held (dismissing the appeal):

[1a] The complainant had clearly identified the accused at the identification parade, as well as from the dock, as the person who had forced her to perform fellatio and who had raped her. Contrary to the accused's assertion, there were **no** doubts or uncertainties in the complainant's evidence respecting her identification of the accused. (pp 655 d & 656 b)

[1b] The discrepancies in the complainant's testimony did not detract from the value of her evidence; there were **no** material discrepancies. The trial judge was thus right in ruling – at the end of the impeachment proceedings – that the complainant's credit remained unimpeached; he had had the advantage of seeing and hearing the complainant and the other witnesses give evidence and was convinced of the truth of the complainant's version. (pp 657 e & 658 a-b)

[2a] PW2 was indeed an accomplice in respect of a part of the criminal transaction out of which the two charges against the accused arose. Hence, the trial judge's ruling that PW2 was **not** an accomplice – with respect to the charges under ss. 376 and 377C that were brought against the accused – was wrong. This, however, was not a fatal error, at least in respect of the reception of PW2's evidence against the accused; it did not vitiate the prosecution's case. (pp 658 e & 659 e-h)

[2b] Section 133 of the Evidence Act 1950 provides that, "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." In the present case, there was sufficient corroborative evidence upon which the trial judge had relied to sustain the conviction of the accused. (pp 660 a-c, 661 e-h & 662 d)

[3] The accused's defence was merely one of denial. The trial judge was right in holding that the accused had failed to raise a reasonable doubt in the prosecution's case. There was also no misdirection on the burden and standard of proof required. (pp 664 a-b, 665 g-h & 666 b)

[Appeal against conviction dismissed; sentence of imprisonment reduced to seven years for each charge.]

Case(s) referred to:
Ah Mee v. PP [1967] 1 MLJ 220 ***(refd)***
Din v. PP [1964] 30 MLJ 300 ***(refd)***
Director of Public Prosecutions v. Hester [1973] AC 296 ***(refd)***
Goh Ah Yew v. PP [1949] 15 MLJ 150 ***(foll)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Ling Tee Huah [1982] 2 MLJ 324 HC ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1993] 3 MLJ 702 ***(foll)***
R v. Hills [1988] 86 Cr App R 26 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 114, 133
Penal Code, ss. 368, 376, 377C

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, vol 2, 24th edn, p 1796

For the appellant - Adam Yap Boon Han; M/s Kitson Foong & Assoc
For the respondent - Ahmad Bache DPP

Reported by Gan Peng Chiang

JUDGMENT

Mohd Ghazali Yusoff J:
The appellant was charged with an offence of committing carnal intercourse against the order of nature without consent under s. 377C of the Penal Code ("the Code") and an offence of rape under s. 376 of the same. The charges against the appellant read:

1st charge:

Bahawa kamu, pada 5hb Ogos 1999, jam lebih kurang 10.30 malam di sebuah bilik di rumah no. 2-6-13, Jalan 18/118B, Desa Tun Razak, dalam daerah Cheras, dalam Negeri Wilayah Persekutuan Kuala Lumpur, telah melakukan persetubuhan yang bertentangan dengan aturan tabii iaitu memasukkan zakar ke dalam mulut seorang perempuan Tan Siew Yin KP: 741116-02-5372 tanpa kerelaannya. Oleh itu, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 377C Kanun Keseksaan.

2nd charge:

Bahawa kamu, pada 5hb Ogos 1999, jam lebih kurang 10.30 malam di sebuah bilik di rumah no. 2-6-13, Jalan 18/118B, Desa Tun Razak, dalam daerah Cheras, dalam Negeri Wilayah Persekutuan Kuala Lumpur, telah merogol seorang perempuan Tan Siew Yin KP: 741116-02-5372 dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 376 Kanun Keseksaan.

At the outset, the appellant was tried with three other persons, namely, Toe Yong Fah @ Foo Yong Fah (SP2), Ng Chin Hock (Ng) and Hor Yoke Kam. The said three persons were charged with an offence of wrongfully keeping in confinement the complainant in this case (SP1) under s. 368 of the Code and an offence of using criminal force on SP1 with intent to outrage her modesty under s. 354 of the same. Ng was also charged with an offence of rape under s. 376 of the same. SP2 pleaded guilty whilst Hor Yoke Kam, an office colleague of SP1 and a female companion of Ng, was acquitted and discharged at the close of the prosecution's case. Ng and the appellant were ordered to enter upon their defence on the respective charges against them.

At the close of the defence case, Ng was found guilty and convicted on all the three charges preferred against him. The appellant was also found guilty and convicted on both charges preferred against him, *viz.*, the offence of committing carnal intercourse against the order of nature without consent under s. 377C of the Code and the offence of rape under s. 376 of the same. He was sentenced to ten years imprisonment effective from the date of arrest and two strokes for the offence under s. 377C of the Code and ten years imprisonment effective from the date of arrest and 3 strokes for the offence under s. 376 of the same. The appellant appealed. At the end of the day, I dismissed the appeals against conviction but reduced the sentence of imprisonment from ten years to seven years, respectively. The imposition of the total of five strokes by the learned sessions court judge ("the learned trial judge") was affirmed. Against this decision the appellant appealed.

The salient facts of the case are as follows:

(1) On 5 August 1999 at around 7pm, SP1 was overpowered by SP2 and a Malay man by the name of Din when she was about to enter her motor-car which was parked in the basement of the office building where she worked. SP2 then drove the motor-car from the basement car-park, whilst Din who was armed with a knife watched over her in the back seat, to an apartment block situated in Desa Tun Razak, Cheras, Kuala Lumpur. She was then brought to apartment No. 2-6-13, Jalan 18/118B which was occupied by SP2 ("the said apartment").

(2) At the said apartment she was placed in one of the bed rooms. Later, SP2 entered the bed-room and asked her to hand over her ATM, Visa and Master cards and also their respective PIN numbers. She handed the cards but informed SP2 that she could not remember the PIN numbers.

(3) Subsequently, Ng and the appellant arrived at the said apartment. Upon the instructions of Ng, SP2 forced SP1 to strip and took some photographs of her in the nude. The appellant then entered the said room and forced her to perform oral sex on him, *viz*., by thrusting his penis into her mouth. He then raped her. Ng later entered the said room and also raped her.

(4) SP1 was forced to stay overnight in the said apartment and on the following day, ie, 6 August 1999, SP2 together with Din drove her to the Sungei Way area in Petaling Jaya and dropped her near a roundabout. With the assistance of a member of the public she managed to call her brother from a public telephone who later arrived and brought her to the Sungei Way police station where she lodged a report (exh. P2). She later made another police report at the Cheras police station.

(5) After the second report was lodged, one Inspector Tan (SP9), the investigation officer of the case, together with SP1 went to search for the said apartment but failed to locate it. SP9 then brought her to the Kuala Lumpur General Hospital for a medical check-up and she was warded for three days. After her discharge on 9 August 1999 she again went to look for the said apartment together with SP9 and managed to locate it.

(6) On 6 January 2000 SP1 identified the appellant, SP2 and Ng at an identification parade held by the police.

In his evidence, SP2 confirmed that prior to 5 August 1999 Ng instructed him to kidnap SP1. On 5 August 1999 at about 4.50pm, Ng brought Din and him in a motor-car to SPVs office and dropped them in front of the building. Din and him went to the basement car-park and waited for SP1. At about 7pm they saw SP1 coming out of the lift and going towards her motor-car. They immediately grabbed hold of her and forced her into the back-seat of her motor-car. He then drove SP1's motor-car to the said apartment whilst Din sat in the back-seat with her. Upon arrival, he informed Ng by telephone. At about 9pm the same day, Ng arrived with the appellant. A few minutes later Ng and the appellant went out for a drink. Prior to that, Ng instructed him to ask SP1 for the PIN numbers to her cash card and credit cards. She did not give the numbers. Later, Ng and the appellant returned to the said apartment with an instant camera and instructed him to take photographs of SP1 in the nude. Ng also instructed him to inform SP1 that the appellant and him will rape her if she refused to reveal the PIN numbers. He did so as instructed but failed to get her to reveal the PIN numbers.

The appellant then entered the bed-room whilst Ng and him waited in the lounge. A few minutes later he knocked on the door and entered the bed-room to see what was going on. He saw the appellant and SP1 having a conversation. He then left the bed-room. A few minutes later, he saw the appellant coming out of the bed-room naked and going to the bath-room. The appellant then informed Ng that he was going home and left the apartment. Subsequently Ng took off his clothes and entered the bed-room. He then heard SP1 screaming. Later Ng came out of the bed-room and put on his clothes and requested him to send him home. He did as requested and instructed Din to watch over SP1 while he was out.

On the following day, ie, 6 August 1999 at about 7pm, he brought SP1 in her motor-car to Sungei Way and released her. He later met Ng who asked him to follow the latter to a photography shop situated in his village in Tanjung Karang to develop the roll of film used to take the photographs of SP1 in the nude. Upon being informed by the shop-keeper (SP7) that the film was empty, Ng threw away the instant camera. In his evidence SP7 confirmed that SP2 and Ng came to his shop to develop a roll of film. He stated that Ng informed him that they had taken some nude photographs. Upon informing them that the roll of film was empty, Ng dumped it in a dustbin at the front of his shop.

In his evidence, one Inspector Koh Jok Tian (SP4) confirmed that SP1 identified the appellant at an identification parade held on 6 January 2000. SP1 informed him that the appellant was the first person who entered the bed-room and had asked her to perform oral sex on him before raping her.

In her evidence, one Dr Zalina bte Salleh (SP8), who was attached to the Kuala Lumpur General Hospital, stated that on 7 August 1989 at about 5.30am she carried out a medical examination on SP1 and discovered there was an abrasion on her left hand and her hymen and that there were seminal stains and also a fresh tear to her private parts.

At the close of the case for the prosecution, the learned trial judge found that the prosecution had made out a *prima facie* case against Ng and the appellant and ordered them to enter upon their defence on the respective charges against them.

In his evidence, Ng stated that on the day of the incident he was at his brother-in-law's shop when SP2, whom he has known for about a month prior to the incident, called him on the telephone and asked for a lift. He then picked up Ng and Din in Hor Yoke Kam's motor-car and dropped them at SEA Park at about 5pm. At about 10pm the same day, he received a telephone call from SP2 who asked him to come to the said apartment as the latter wanted to show

him "something". The appellant gave him a lift and they went together to the said apartment where they met Din. A few minutes later he saw a shirtless SP2 coming out of a bed-room and holding a camera. Simultaneously, he heard the sound of a girl's scream coming from the bed-room. SP2 informed him that the "something" he wanted to show him was the girl in the bed-room. SP2 then asked the appellant and him whether they wanted to rape her. They declined the offer and left the said apartment.

In his evidence, the appellant stated he had known Ng for about 15 years. At about 10.30pm on the night of the incident, he received a telephone call from Ng who wanted a lift from him. He then picked up Ng and brought him to the said apartment where he met Din whom he has never met prior to the incident. He then heard a girl screaming in one of the rooms and saw SP2, whom he has also never met before, coming out of the room holding a camera. SP2 informed Ng that he had caught a girl and asked Ng whether he would like to have sex with her. Ng declined the offer. He then informed Ng that he wanted to go home and they both left. He insisted that he was in the said apartment for only about two to three minutes. He was arrested on 4 January 2000. The next occasion he saw SP2 was at the police station. He also insisted that the first time he met SP1 was at the identification parade held at the police station. He denied that he asked SP1 to perform oral sex on him or having raped her on the night of the incident.

At the close of the defence case, the learned trial judge found both Ng and the appellant guilty and convicted them on the respective charges preferred against them. Both of them appealed against their respective conviction and sentence but Ng had since withdrawn his appeal. In the appeal before me, counsel for the appellant raised the following issues:

(i) that the learned trial judge erred in fact and in law when he failed to take into consideration the material discrepancies apparent in the testimony of SP1;

(ii) that the learned trial judge erred in fact and in law when he ruled, in the course of impeachment proceedings against SP1, that her credit was not impeached despite the existence of material contradictions in her testimony;

(iii) that the learned trial judge failed to evaluate the testimony of SP1 which contained doubts and uncertainties especially in relation to her identification of the appellant;

(iv) that the learned trial judge erred in fact and in law when he accepted the uncorroborated evidence of SP2 and ruled that he was not an accomplice;

(v) that the learned trial judge erred in fact and in law when he ruled that the appellant had failed to raise a reasonable doubt and misdirected himself as to the burden of proof.

I will first deal with the first, second and third issues raised by counsel for the appellant as they are inter-related. According to counsel, the material discrepancies in the testimony of SP1 were as follows:

(a) SP1 stated in examination-in-chief that she knew Ng and that he was a male companion of Hor Yoke Kam and had seen him fetching her for lunch at the office. Counsel drew my attention to the testimony of SP1 in the course of examination-in-chief found in pp. 30-31 of the appeal record which read as follows:

> I only saw the person who had sex with me later as fair, skinny and his nose is big. I saw he came and fetched Hor Yoke Kam for lunch ... I had seen him before.
>
> I had seen the 2nd accused (Ng) before ... I had saw him 2-3 times before.

Counsel then referred to what SP1 stated under cross-examination at p. 76 of the appeal record which read:

> Q. You also said at the time incident you never seen 2nd (Ng) and 4th accused (the appellant).
>
> A. Yes before the incident I had not seen them before.

With due respect to counsel, the above excerpts from the testimony of SP1 specifically referred to above by him seems to have been taken out of context. The full text of that part of the testimony of SP1 reads:

> On 6/1/2000 I did go to balai to attend ID parade. I did recognised the person – I regognised three persons. I recognised two guys seating there – in white shirt and gray shirt and another guy that came in just now – the person who drove the car.
>
> The person wearing the white shirt asked me to do oral sex to him and rape me.
>
> Tertuduh Keempat (appellant) di camkan.
>
> The guy who came in later was the one wearing gray shirt – Tertuduh Kedua (Ng) dicamkan.

He raped me on the bed. He was on top of me and put his penis into my vagina. I was not wearing any pant at that time. He didn't wear any underwear. I didn't wear any panty. He put in and out his penis to my vagina for few time. I was screaming and crying. The guy who drove my car came in to the room and asked him to go out, and asked him to leave me alone into the room because what they want is only money.

Both of them then went out from the room.

His penis penetrated my vagina. At that time I didn't know the person whom I did oral sex to him at that time. I only saw the person who had sex with me later as fair, skinny and his nose is big. I saw he came and fetched Ho Yoke Kam for lunch at our office. I had seen him before.

I had seen the 2nd accused before. He is boyfriend to Jessy Hor Yoke Kam. I saw him before when he fetched Jessy for lunch. At that time I didn't know his name.

I had saw him 2-3 times. (emphasis added)

From my reading, the above notes reproduced in full would show that SP1 clearly identified Ng and the appellant. At the trial, she identified the appellant who was seated in the dock and who was wearing a white shirt as the person who asked her to perform oral sex on him and who then raped her. She also identified Ng who was seated in the dock and was wearing a grey shirt as the person who came in later and raped her. She stated that during the incident she did not know Ng's name. She also stated that she did not know the appellant at the time of the incident but later observed him as being "fair, skinny and his nose is big". Subsequent to that she said she had seen Ng before the incident when he fetched Hor Yoke Kam for lunch. That is how I read that part of the notes of evidence as recorded by the learned trial judge. Counsel has seen it fit to only refer to part of pp. 30 and 31 of the appeal record to formulate this discrepancy. He did not however refer to p. 33 of the appeal record which, from my reading, would dissipate this alleged discrepancy. What SP1 later stated, at p. 33, read as follows:

That is the room that I had been detained.

From this photo J, the light from the road lighting was in photo J.

I can see the shape of face, the nose and body side in skin colour.

Tertuduh Kedua is fairer in nose bigger and smaller size compare to Tertuduh Keempat.

Tertuduh Keempat is dark – Body size big, nose "mancung". I can't figure out the shape of the faces. I can remember now.

Tertuduh Kedua same too. It is difficult to remember everything.

On the 6th January 2000 I attended ID parade. I was brought two times. It was two times at the same day.

On the same identified two person who rape me. The one who asked me to do oral sex by me is one of them.

Looking at the testimony of SP1 and the grounds of decision of the learned trial judge, I cannot see how counsel can contend that the testimony of SP1 contains doubts and uncertainties in relation to her identification of the appellant and can even suggest that the learned trial judge failed to evaluate the testimony of SP1 on this issue.

On the same issue, counsel had also compared the testimony of SP1 with what was stated in the first police report which she made at the Sungei Way police station. The police report she made which was recorded by SP6 reads:

Pada 4/8/99 jam 7 ptg saya balik dari kerja di alamat Delteq Technoplex Suite 2.2 tingkat 2 Jonhnson Controls di Jln 243. Saya terus menuju ke basement (2) car park dan ternampak (1) lelaki yg agak ganjil perangainya di depan lif. Saya pun menuju ke kereta saya dan ternampak (1) lagi seorang lelaki menyorok di tiang batu dekat kereta saya. Tanpa saya sedar kedua lelaki tadi terus meluru kearah saya dan mengacukan sebilah pisau ke arah perut saya. Mereka paksa dan tolak saya ke belakang kereta. Seorang daripada mereka berbangsa melayu yg membawa kereta saya dan yg seorang lagi berbangsa cina duduk bersama saya sambil mengacukan pisaunya ke arah saya. Dlm perjalanan mata saya ditutup. Bila saya sedar saya agak saya berada di Tmn Segar Ceras. Keduanya bawa saya ke sebuah flat 6 tingkat. Sampai di tingkat 6 mereka terus bawa saya ke satu bilik dimana dlm bilik itu mereka telah meminta semua kad Atm saya berserta duit RM250. Seterusnya memaksa saya bagaimana nak mengeluarkan duit melalui kad visa dan master. Saya bagitahu saya tidak tahu dan mereka berdua pun rogol saya sebanyak dua kali. Saya tidak tahu ada 2 lelaki lagi berbangsa cina datang kesitu. Mereka itulah yg merogol saya. Bila saya duduk diam mereka bagi saya pil sebanyak 2 biji untuk 1 jam dan paksa saya berbogel untuk ambil gambar. Juga mereka bagi saya ganja untuk menghisap. Mereka menahan saya sampai hari ini 6/8/99. Mereka lepaskan pd pukul 7.00 ptg setelah mereka semua keluarkan duit saya dgn cara apa saya tidak tahu. Kedua lelaki yg mula hantar balik saya dgn kereta saya di separuh jln di round-about dekat masjid. Datang ke balai buat laporan serta ... kereta saya no. WFM 6114 jenis satria warna putih.

Counsel pointed out:

(i) in her testimony, she stated that the incident in her office car-park took place on 5 August 1999 whereas in her police report she stated it was on 4 August 1999;

(ii) in her testimony, she stated that it was SP2 who drove her motor-car from her office car-park to the said apartment whereas in her police report she stated that it was Din who drove her motor-car;

(iii) in her testimony, she stated that it was Din who watched over her in the back-seat of her motor-car whereas in her police report she stated that it was SP2 who watched over her;

(iv) in her testimony, she stated she was not blind-folded during the trip whereas in her police report she stated she was blind-folded.

Counsel further pointed out that in her testimony, SP1 stated they had to pass a security guard at the exit booth of her office car-park whereas SP2 said there was no security guard and to exit from the car-park he used an electronic security card. Counsel also pointed out she stated in her testimony that at the said apartment, SP2 did not force her to smoke ganja whereas in her police report she stated she was given ganja.

I have carefully weighed the evidence available before the learned trial judge and considered the discrepancies canvassed by counsel and at the end of this exercise, it is my view that the discrepancies highlighted do not detract from the value of the testimony of SP1. In her evidence, SP6, who joined the police force on 1 January 1999, confirmed that she recorded the report of SP1 (exh. P2) in Bahasa Malaysia on 6 August 1999. She also said that that was her first experience. She noticed that SP1 looked very weak and was not looking well when she took down her report. She said:

> Semasa laporan dibuat perempuan cina itu di dalam keadaan lemah dan tidak bermaya.
>
> Saya ambil masa agak lama untuk catat laporan – sebab saya tak berapa pandai nak terima laporan. Ini juga kali pertama saya terima laporan yang agak panjang lebar di dalam keadaan yang agak kelam kabut. Saya pun baru – ketua guard saya tolak bulat-bulat kepada saya. Saya baru kali pertama terima laporan ini – saya baru berpindah ke Balau Sungai Way.
>
> Setelah selesai tulis saya tidak bacakan semula apa yang saya tuliskan – saya tidak baca semula kerana pada masa yang sama pegawai penyiasat datang. Dia di dalam keadaan tergesa-gesa rnengajak pengadu ke tempat kejadian.

I have thoroughly perused the evidence adduced relating to the above issues raised by counsel and I cannot find any material discrepancies in the testimony of SP1. Under the circumstances, I cannot see how it can be said that the learned trial judge erred when he ruled in the course of impeachment proceedings that her credit was not impeached. The learned trial judge had the advantage of seeing and hearing SP1 and the other witnesses give evidence and he was convinced of the truth of SP1's story; it was clear from his grounds of decision that he had evaluated her testimony. Counsel was not able to demonstrate that the learned trial judge's findings are plainly wrong or perverse and as such, I am not with him as far as these issues are concerned.

On the fourth issue, counsel contended SP2 was an accomplice but the learned trial judge ruled otherwise; he accepted the uncorroborated evidence of SP2. From my reading of his grounds of decision, the learned trial judge did find that SP2 was an accomplice as far as the case against Ng (not including the rape charge) and Hor Yoke Kam were concerned, but not with regards to the case against the appellant. He was of the view that SP2 did not play an active role in the offences alleged to have been committed by the appellant and as such, cannot be termed an accomplice. This is what he said in his grounds of decision:

> Saya dapati dari keadaan kes ini jikapun SP2 boleh dikatakan rakan sejenayah, ia tidak boleh dikatakan rakan sejenayah bagi kesalahan di bawah seksyen 377C dan seksyen 376 Kanun Keseksaan yang dipertuduhkan ke atas tertuduh. Tidak ada keterangan yang boleh ditunjukkan bahawa kesalahan yang dilakukan oleh dibantu oleh tertuduh pertama.

I am of the view that such an approach is incorrect. In *Goh Ah Yew v. Public Prosecutor* [1949] 15 MLJ 150 it was held that the view that the term accomplice is confined to a person who is guilty of the same offence as the accused is wrong and that as the evidence showed that the witness in the case concurred in the criminal designs for a certain time, he was therefore an accomplice. Spenser-Wilkinson J said (at p. 153):

> The Deputy Public Prosecutor attempted to argue before us that whilst giving evidence upon one charge a witness may be considered as an accomplice and yet in considering the evidence of the same witness in the same trial on a different charge it would not be necessary to look for corroboration if he were not an accomplice in respect of that different charge. This might be a possible position if the transaction in respect of which the witness was an accomplice was completely different both in time and place from the transaction out of which the charge against the accused arose; but we cannot accept this contention in a case of this kind where the witness was an accomplice in respect of a part of the criminal transaction out of which the charges in the

> case arose. Once the evidence of a witness has been rendered unworthy of credit by reason of his complicity in one offence then his credit has gone for all purposes of the trial. A witness cannot be regarded as a split personality who is worthy of credit at one moment and unworthy of credit at the next.

In relation to accomplices, KG Vohrah J (as he then was) in *PP v. Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702, posed the following question, namely, how does one determine whether a person is an accomplice? He answered the question as follows:

> As pointed out in 2 Sarkar at p. 1280:
>
> The point for determination appears to be whether the witness entered into the conspiracy with the sole object of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those till out of fear or for some other reasons he withdrew from the conspiracy and gave information to the authorities. If he extends no aid to the prosecution until after the offence has been committed, he would be an accomplice. If he originally joined the conspiracy with the sole object of taking part in the crime, he cannot change his position to that of an informer by subsequently giving information of the crime (see *Karim v. R* 9 L 550; *Pulin v. R* 16 CWN 1105, 1148; *R v. Chaturbhuj* 38 C 96; *Mohan Lal v. R* AIR [1947] N 109).

In the instant case, I am of the view that SP2 was an accomplice in respect of the criminal transaction out of which the charges in the case arose, whether it be against Ng, Hor Yoke Kam or the appellant. He took part in abducting SP1 and was the one who drove her motor-car to the said apartment. He kept her in confinement until the arrival of Ng and the appellant. He actively took part in the criminal transaction by demanding from SP1 her credit cards and asking her to reveal the PIN numbers. He even took photographs of her in the nude on the instructions of Ng. He subsequently kept her in confinement until the following day when he released her in Sungei Way. He may have not anticipated that SP1 would be raped and may have attempted to discourage Ng and the appellant from raping her but the evidence did show that he concurred in the criminal designs of Ng and the appellant throughout the criminal transaction. The learned trial judge was wrong when he ruled that as far as the charges against the appellant were concerned, SP2 was not an accomplice. SP2 was clearly an accomplice.

He had been convicted and sentenced and this was clearly within the knowledge of the learned trial judge as he had pleaded guilty before him. The question now arising is whether the learned trial judge's ruling that SP2 was not an accomplice as far as the charges against the appellant is concerned, was fatal. I do not think so. Section 133 of the Evidence Act 1950 reads:

> An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Illustration (b) of s. 114 of the same reads:

> The court may presume:
>
> (b) that an accomplice is unworthy of credit unless he is corroborated in material particulars:

From my reading of the appeal record, there were sufficient corroborative evidence which were relied upon by the learned trial judge and which evidence would allow the conviction of the appellant to stand. What is corroboration? In *Ah Mee v. Public Prosecutor* [1967] 1 MLJ 220, Ong Hock Thye FJ said (at p. 222):

> ... corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence:

In *Din v. Public Prosecutor* [1964] 30 MLJ 300, Thomson LP was of the view that if a woman complains of having been raped, then both prudence and practice demand that her evidence should be corroborated. In *R v. Hills* [1988] 86 Cr App R 26 at pp. 30-31, the learned Lord Chief Justice, in reading out the judgment of the court said:

> Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) by medical evidence that she had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence.

In *Director of Public Prosecutions v. Kilbourne* [1973] 57 Cr App R 381, 409, [1973] AC 729, 750 Lord Reid said:

> There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in.
>
> The other statements or circumstances are only of value if, having regard to what is in issue, they come from a source or sources independent of the accomplice and go some part of the way towards proving guilt, by tending to show that the offence was committed and that the accused committed it.
>
> It is therefore always important to consider: (1) what are the real issues in the case; (2) what the evidence being put forward as corroboration does in fact prove. The proof may of course come from several sources, and in that sense corroboration may be cumulative as already illustrated; (3) whether that evidence: (a) comes from a source or sources independent of the accomplice; (b) goes some significant part of the way towards showing that the offence was committed and that the accused committed it.

The learned trial judge found that SP1 was a credible witness. In her evidence she had described how she was forced into the back seat of her motor-car by SP2 and Din and driven to the said apartment and kept in confinement. The report that she lodged with SP6 on 6 August 1999, ie, exh. P2 wherein she complained that she was raped by the two men, was a first information report. The evidence showed that after her discharge from the hospital, she managed to locate the apartment. This was confirmed by SP9. The evidence of SP7 which showed that Ng and SP2 visited his shop to develop the roll of film utilised to take nude photographs would support SP1's story that SP2 took photographs of her in the nude. SP1 had also managed to identify the appellant at the identification parade, conducted by SP4, as the first person who entered the bed-room and had asked her to perform oral sex on him and who later raped her. The evidence of Dr Zalina binte Salleh (SP8) which showed that there was an abrasion on her left hand and her hymen and that there were seminal stains and also a fresh tear to her private part would corroborate SP1's story that she was raped. These injuries would show that there was lack of consent and that there was resistance. SP6's description of SP1 at the time when the report (exh. P2) was lodged, *viz.*, that she looked very weak and was not looking very well is also, to me, a piece of corroborative evidence. In *Director of Public Prosecutions v. Hester* [1973] AC 296 Lord Morris of Borth-y-Gest said (at p. 315):

> The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said ... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible: and corroborative evidence will only fill its role if it itself is completely credible evidence.

In *Din v. Public Prosecutor, supra*, Thomson LP said

> The rule relating to corroboration, like most of the other rules of our law of evidence, is not a purely technical rule contravention of which is fatal to a conviction. The rules of evidence are not rules for governing a forensic game of chess; they are rules for the administration of justice and they are based on accumulated human experience and common sense. That particularly applies to the rules of corroboration.

Following the views of the Lord Chief Justice in *R v. Hill* and looking at the evidence as a whole I am of the view there were sufficient corroborative evidence upon which the learned trial judge could properly arrive at the conclusion he did at the close of the case for the prosecution. SP1's evidence did not suffer from any basic infirmity. There was corroboration of parts of SP'1 story and the combined effect of those items, discussed above, would be capable of corroborating SP1's story. In conclusion, I am of the view that the incorrect finding by the learned trial judge that SP2 was not an accomplice do not at all vitiate the prosecution's case.

Counsel for the appellant had also canvassed at this appeal that the learned trial judge misdirected himself as to the burden of proof when he ruled that the appellant had failed to raise a reasonable doubt. I would now deal with this issue.

Section 377C of the Code reads:

> Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

For an offence under this section, the prosecution must prove that the appellant had carnal intercourse against the order of nature with SP1. By thrusting his penis into her mouth and asking her to suck it would be tantamount to carnal intercourse against the order of nature. There was penetration and the appellant did the act voluntarily and that SP1 did not consent to it.

Section 375 of the Code reads:

> A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:
>
> (a) against her will;
>
> (b) without her consent;
>
> (c) ...;
>
> (d) ...;
>
> (e) ...;
>
> (f) ... .

Section 376 of the Code reads:

> Whoever commits rape shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

According to the *Concise Oxford Dictionary* 9th edn "rape" is "the act of forcing a woman to have sexual intercourse against her will". For an offence under s. 376 of the Code, the prosecution must prove:

(i) that the appellant had sexual intercourse with a woman;

(ii) that the act was done against her will or without her consent;

(iii) that there was penetration.

According to *Ratanlal & Dhirajlal's Law of Crimes*, vol. 2, 24th edn at p. 1796:

> in a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts (*Tukaram* 1978 Cri LJ 1864 (SC); 1979 SCC (Cri) 381 (Bom))". ... However great the suspicion against the accused and however strong the moral belief and conviction of the Judge, unless the offence of the accused is established beyond reasonable doubt or beyond the possibility of reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring the offence home to the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

At the close of the case for the prosecution, the learned trial judge found that the prosecution had made out a prima case against the appellant on both charges and called upon him to enter on his defence. His grounds of decision showed that he evaluated the evidence adduced by the prosecution at the close of their case and considered whether the prosecution had made out a *prima facie* case against the appellant. In considering this, he referred, *inter alia,* to *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215 at p. 275 where Augustine Paul J said:

> A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence.

With the above in the forefront of his mind, the learned trial judge went on to evaluate the evidence before him including what must be proved by the prosecution for each charge preferred against the appellant. He then found that the prosecution had made out a prima case against the appellant on both charges and called upon him to enter on his defence. In his defence, the appellant admitted that he was in the said apartment on the night of the incident but claimed he was only there for two or three minutes. He denied having entered the bedroom and committing the two offences as charged. This is what he said:

> Bila sampai T2 bawa saya ke rumah kawannya. Seterusnya dia ketuk pintu. Ada seorang lelaki Melayu buka pintu. Saya tidak kenal lelaki Melayu itu. Saya dan Tertuduh Kedua dijemput masuk ke dalam.
>
> Semasa masuk kedalam saya tidak lihat orang lain. Seterusnya saya terdengar suara jeritan perempuan dari sebuah bilik.
>
> Saya hanya dengar tetapi tidak nampak apa-apa. Seterusnya saya nampak seorang lelaki Cina keluar dari bilik. Saya tidak kenal lelaki Cina ini.
>
> Semasa keluar dari bilik lelaki itu tidak pakai baju. Dia hanya pakai seluar panjang. Tangannya pegang sebuah kamera.
>
> Dia ada bercakap dengan Tertuduh Kedua. Dia beritahu Tertuduh Kedua dia telah tangkap seorang perempuan dan dia tanya Tertuduh Kedua samada dia hendak adakan hubungan seks dengan perempuan itu.

Seterusnya saya tidak dengar apa-apa. Masa itu saya rasa sakit.

Tertuduh Kedua kata dia tidak hendak mengadakan hubungan seks dengan perempuan itu.

Selepas itu saya terus beritahu Tertuduh Kedua saya hendak balik kerana masih belum mandi.

Saya hantar Ah Hock balik dahulu seterusnya selepas hantar Tertuduh Kedua saya terus balik kerumah saya.

At the close of the case for the defence, he found the appellant guilty on both charges. From my reading of his grounds of decision, I am satisfied that the learned trial judge did appreciate what was said by the learned judge in *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No. 3)*, namely, that a case can be said to have been proved beyond reasonable doubt only upon a consideration and assessment of all the evidence and that a case cannot be said to have been proved beyond reasonable doubt until the accused has concluded his case. In his grounds of decision, the learned trial judge said:

Pembelaan tertuduh terhadap kedua-dua pertuduhan ini merupakan pembelaan yang menafikan melakukan kedua-dua perbuatan tersebut. Tertuduh mengatakan di dalam pembelaannya beliau berada dirumah itu dalam masa 2 hingga 3 minit saja. Ini adalah pembelaan penafian semata-mata. Saya telah menimbangkan pembelaan tertuduh ini dan saya dapati pembelaan sebegini tidak dapat menimbulkan apa-apa keraguan yang munasabah terhadap kes pendakwa bahawa tertuduh telah memaksa SP1 menghisap kemaluannya yang merupakan satu kesalahan di bawah seksyen 377C Kanun Keseksaan. Pembelaan tertuduh juga tidak dapat menimbulkan keraguan yang munasabah terhadap kes pendakwa bahawa tertuduh telah memasukkan kemaluannya ke dalam kemaluan SP1 tanpa kerelaan SP1. Pembelaan tertuduh juga tidak dapat menimbulkan keraguan yang munasabah bahawa identiti tertuduh telah dapat dicamkan oleh SP1. Secara keseluruhannya pembelaan tertuduh merupakan pembelaan penafian semata-mata yang tidak mencukupi untuk menimbulkan keraguan yang munasabah terhadap kes pendakwa.

The appellant's defence was one of denial. He admitted being present at the said apartment on the night of the incident. The learned trial judge had evaluated the appellant's defence and was satisfied that no reasonable doubt has been raised in that exercise. That would denote that he was satisfied that the case against the appellant had been proved beyond reasonable doubt. I cannot find anywhere in his grounds of decision which would tend to denote that had misdirected himself on the burden of proof as alleged by counsel for the appellant which consequently, according to counsel, had resulted in a miscarriage

of justice. In *Public Prosecutor v. Ling Tee Huah* [1982] 2 MLJ 324, which was referred to by the learned trial judge in his grounds of decision, Yusoff Mohamed J said (at p. 326):

> A mere denial without other proof to reasonably lodge the prosecution's evidence is not sufficient.

From my reading, the learned trial judge had examined all the surrounding circumstances before finding the appellant guilty as charged. The appellant has not shown that the finding of the learned trial judge cannot be supported by the evidence or is plainly wrong or perverse. On that basis I dismissed the appeal by the appellant against conviction on both charges.

As discussed earlier, the appellant was sentenced to ten years imprisonment effective from the date of arrest and two strokes for the offence under s. 377C of the Code and ten years imprisonment effective from the date of arrest and 3 strokes for the offence under s. 376 of the same. I had reduced the sentence of imprisonment from ten years to seven years, respectively, but affirmed the imposition of the total of five strokes by the learned trial judge. It is my view that a sentence of ten years imprisonment for each of the charges is quite excessive. The appellant is a first offender and was 34 years old when he was charged. Under the circumstances, I would think that justice will be best served if I reduce the sentence of imprisonment to seven years, respectively.